Office Supreme Court, U.S.
FILED
JUN 3 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 1067

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, ET AL.,

Petitioners,

vs.

LOCAL 1441, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, and RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, and NATIONAL LABOR RELATIONS BOARD,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY MEMORANDUM

JACOB SHEINKMAN,
15 Union Square,
New York, New York 10003,
Attorney for Petitioners.

INDEX

Table of Cases Cited

	PAGE
Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568	5m
International Shoe Company v. Federal Trade Commission, 280 U. S. 291	5m

Statutes Cited

National Labor Relations Act:	
Section 8(b)(1)(a)	1, 2
Section 8(a)(2)	1

IN THE

Supreme Court of the United States

October Term, 1963

No. 1067

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO; CENTRAL STATES JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO; AND KENTUCKIANA JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO,

Petitioners,

vs.

LOCAL 1441, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, AND RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, AND NATIONAL LABOR RELATIONS BOARD,

---

PETITIONERS' REPLY MEMORANDUM

The Memorandum of the National Labor Relations Board filed in this matter, in stating the Board's reasons for opposing the petition herein, only serves to buttress petitioners' argument that the issues presented by the said petition are ripe for review at this time. The petition sets forth three basic objections to the decision of the Circuit Court of Appeals, all of which are stated as the "Questions Presented" in said Petition, and they are:

> 1. Whether an agreement between a union agent and a company agent to hire union organizers as regular employees violates Section 8(b)(1)(A) of the National Labor Relations Act, where no organizers were hired pursuant to such agreement, and where there has been no finding that the union was otherwise aided or assisted in violation of Section 8(a)(2) of the National Labor Relations Act.

2. Whether the Court of Appeals on review of a Decision and Order of the National Labor Relations Board may rule on an alleged violation of the National Labor Relations Act not alleged in the complaint issued by the Board and not raised by any of the parties in any prior proceeding on or before the Court itself.

3. Whether the Court of Appeals on review of a Decision and Order of the National Labor Relations Board may remand a case to the Board for the taking of evidence on a point involving a novel theory of law not raised by any of the parties in any prior proceeding or before the Court itself, where such a remand was not requested by any of the parties and where there is no showing that the evidence sought was not available at the hearing before the Trial Examiner.

The Board, however, in its memorandum, makes only passing reference to Question 2 (see fn. 7, on page 5 of the Board's Memorandum) and then blithely lumps Questions 1 and 3 together without differentiating between the substantive and procedural aspects thereof. Question 1 is, of course, substantive in nature and raises the issue whether the mere making of an alleged agreement between a union and an employer to have union organizers hired as employees violates Section 8(b)(1)(A) of the National Labor Relations Act, even though no such organizers are hired pursuant thereto and no other violations of the Act are found. This issue is covered in the petition at page 10, *et seq.*, and will not be repeated here. However, because of the Board's statements on pages 4 and 5 of its memorandum, with reference to this issue, Question 3, which raises the procedural aspects of the problem, becomes extremely important. Even, assuming *arguendo*, that the Board is correct in its position that Question 1 is not ripe for review, Question 3 most certainly is, if the Board on the remand of the court below is going to relitigate not only the issue of the existence of a conspiracy but also

whether it was in fact effectuated. Both of these issues were fully understood by all of the parties to be material aspects of the case when it was being tried and there is no need for, nor indeed has any reason been advanced, why additional testimony should be adduced on either or both of them.

On pages 18 and 19 of the petition, petitioners have pointed out that the issue on which the court below directed that additional testimony be taken was fully litigated, and on the basis of the testimony adduced the Trial Examiner found that a conspiracy had been made out (J.A. 177). The Board found that if the Trial Examiner was correct, and an arrangement had been made to hire the three employees in question, the record did not establish that the three employees in question were hired pursuant to that arrangement (J.A. 204-205). Petitioners further pointed out in their petition that by directing the Board to take further testimony with respect to persons who could have been called as witnesses by the parties but in fact were not, and in particular a witness who knew nothing of any alleged agreement, the court below indeed was directing the Board to relitigate this entire case (Pet. p. 19). If there be any doubt in this regard, one need look no further than to the Board's position to the effect that if the Board were to find on remand

> (1) "* * * that no conspiracy in fact existed * * *"; or
>
> (2) "* * * that the conspiracy not only existed, but was indeed carried out"; or
>
> (3) "* * * *both* that the conspiracy existed and it was never carried out" (emphasis supplied),

the issue raised by the petitioners would under (1) or (2) be rendered academic, and under (3) petitioners could then seek review. (Board's Memorandum, p. 4). But, what the Board neglects to mention is that a holding under (2) or (3) requires *de novo* findings as to both the con-

spiracy question as well as its effectuation, a position which the Board cannot reconcile with its decision that the record shows that the three employees in question were hired in the normal course of the Company's business, and not pursuant to any conspiracy, a position it is apparently ready to defend should the Court grant this petition (Board's Memorandum, p. 5).

If for no other reason but because the remand of the court below commands the relitigation of the issue of the effectuation of the conspiracy, as well as its making, *certiorari* must be granted now. If the Circuit Court of Appeals had in fact directed the Board to make a determination solely on the issue of conspiracy on the basis of the existing record which, as the Board points out, the Trial Examiner did in fact do, the Board's argument that petitioners could file for review if the Board should find that the conspiracy did exist, would carry more weight. This the court below did not do. Instead it directed the taking of testimony as to the making of the conspiracy and its effectuation[1] upon which evidence had already been received, the Board having already made a finding in petitioners' favor on the latter issue.[1] It is precisely because of the fact that the impact of the decision of the court below compels a relitigation of the issue of the making of the conspiracy as well as its effectuation that petitioners were forced to file their petition at this time.

Nor does the Board meet petitioners' objections to a reopening of the record for the taking of additional testimony by merely stating that "Neither Ungar nor La Victor testified at the prior hearing." (Board's Memorandum, fn. 4, p. 4.) The failure of the Board to have called these

[1] The testimony of La Victor which the court below directed be taken can only bear on the issue of the effectuation of the alleged conspiracy, not the making of same, because the Board's principal and only witness who testified on this issue testified that La Victor knew nothing of any alleged conspiracy (J.A. 135).

witnesses is not explained by the Board, nor for that matter did the Circuit Court of Appeals indicate that these witnesses were not called because of their unavailability, or the unawareness of the Board that their testimony had a bearing upon the case.[2] No ground, let alone a reasonable ground, is given by the Board at this time which would justify a reopening of the record to take additional testimony, except to give the Board another opportunity to retry its case. This can be the only basis which would support the Board's statement in its memorandum to the effect that "because such an arrangement between an employer and a union is rarely not carried out, the Board decided not to seek certiorari" (p. 5). Nor can the Board justify this statement in the face of its prior holding that the "record does not show that [Amalgamated organizers] were hired pursuant to any 'arrangement'" (J.A. 205), a holding it will defend should the Court grant the petition herein.

In short, if as the Board and petitioners argue, the remand requires the Board to make findings *de novo* on the issue of not only whether the conspiracy existed "but was indeed carried out," which apparently is how the Board and petitioners construe the directive of the court below, then most certainly the issues which petitioners seek to have reviewed at this time are overripe. Petitioners object to the taking of additional testimony on an issue which has been fully litigated and on which the Board can make a finding upon the evidence already received,[3] as

[2] Both Ungar and La Victor were named in the complaint (J.A. 147-148), in General Counsel's Exhibit No. 8 (J.A. 134-137), and in other portions of the record.

[3] *See Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568; *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 291. Moreover, as the Retail Clerks International Association and Local 1441 stated on page 7 of their brief in opposition to the petition, "As Breiholff testified to the conspiracy, and his testimony is uncontradicted, there was no need for the Court to remand the case in this fashion."

well as on the issue as to which the Board already found in petitioners' favor. It is precisely because of the import of the remand and of the consequences which flow therefrom which form the basis for the Court to grant review at this time.

If the Board is prepared to defend its decision should the Court grant the petition,[4] then it should be prepared to oppose the remand in its present form and scope. The issues raised by the petitioners herein are of prime importance when the adoption of a conspiracy *per se* approach to the National Labor Relations Act is for the first time being promulgated.

June, 1964

Respectfully submitted,

JACOB SHEINKMAN,
Attorney for Petitioners.

---

[4] If this be the case, then the Board might well recheck the cases cited by petitioners (Pet. 12-14) in that some of these cases were cited by the Board in its decision, and in its brief to the Circuit Court of Appeals defending that decision.